Filed 7/27/10 In re X.T. CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| In re X.T., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>X.T.,<br>Defendant and Appellant. | A126369<br><br>(Del Norte County<br>Super. Ct. No. JDSQ08-6240) |

## I. INTRODUCTION

Appellant X.T., a minor, appeals from an order revoking his probation on the basis of a positive drug test. He maintains he was denied due process because the "certifying scientist," rather than the technician who performed the lab test, testified regarding the results at the revocation hearing. We affirm.

## II. PROCEDURAL AND FACTUAL BACKGROUND

On January 22, 2009, the court sustained a petition filed by the Del Norte County District Attorney under Welfare and Institutions Code section 602, subdivision (a),[1] alleging X.T. vandalized his high school. The court placed X.T. on probation, one of the conditions of which included drug testing.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

On April 29, 2009, the court sustained a section 777 petition, alleging X.T. tested positive for methamphetamine, which he admitted. The court ordered him to spend the weekend in Juvenile Hall and continued his probation.

On July 27, 2009, the district attorney filed a second section 777 petition, alleging X.T. had violated the terms of his probation by providing a diluted urine sample. The court dismissed the petition on the prosecutor's motion because it was unclear whether the prohibition against diluted urine samples had been adequately explained to X.T. and his parents in their primary language, Hmong. Through an interpreter, the court explained to the minor and his parents that diluted urine tests, achieved by drinking large amounts of water before the test, are considered positive drug tests and a violation of probation.[2]

On September 11, 2009, the district attorney filed an amended section 777 petition, alleging X.T. had provided a diluted urine sample and on August 31, 2009, a methamphetamine-positive sample on September 8, 2009. At the contested hearing, at which a Hmong translator was present, probation officer Lonnie Reyman testified he collected the two urine samples from X.T., sealed each sample, labeled it with the date, X.T.'s name, and his own last name, had X.T. initial the label, and sent it to the lab.

Toxicologist John Martin of Redwood Toxicology Laboratory testified by telephone[3] as to the lab procedures generally and as to the results of X.T.'s two urine samples. He testified no drug analytes were detected in the August 31, 2009 sample, but there was an unusually low creatinine level, indicating the sample was diluted. He explained that according to Substance Abuse and Mental Health Services Administration guidelines, a urine sample is considered dilute when the creatinine level is less than 20. The creatinine level of X.T.'s August 31 sample was 10.6. He testified the September 8,

---

[2] Although X.T.'s attorney indicated X.T. did not speak English, the writings which gave rise to the original vandalism charge included the phrases "Fuck all motherfuckers . . . [f]uck all Mexicans bitch," suggesting X.T. has some understanding of the English language.

[3] The record reflects no objection to the telephonic testimony.

2009, urine sample tested positive for methamphetamine. Three tests were performed on the sample; an initial screening test, a thin layer chromatography test and a "GC/MS"[4] confirmation test. The initial test showed the presence of "the class of drugs amphetamines," and the screening using thin layer chromatography indicated methamphetamine. A subsequent confirmation test done in preparation for the hearing, too, indicated methamphetamine and amphetamine. Martin did not personally perform any of the testing. However, he "reviewed . . . that the standard operating procedures were used and that the daily maintenance, quality assurance for that instrumentation type ha[d] been performed according to standard operating procedure." He also was the certifying scientist as to the thin layer chromatography test, which meant "at the end of that process then I confirmed that all of those steps were done in accordance with our standard operating procedures. So I am the final person prior to that result being accepted and reported." He also read the laboratory file in preparation for the hearing.

X.T.'s attorney objected to Martin's testimony and admission of the lab reports on the basis of chain of custody, right of confrontation and hearsay. The court sustained his objections as to the written lab reports, but denied them as to the testimony. The court stated Martin was entitled to testify "to his expert opinion and, in doing that, he's entitled to use the things that experts of his sort ordinarily and customarily use in their profession . . . ."

The court sustained the amended petition, continued X.T. as a ward of the court, continued his probation and placed him on house arrest. This timely appeal followed.

## III. DISCUSSION

X.T. claims the court erred in allowing testimony about the lab results by the "certifying scientist" rather than the technician who personally performed the tests. He

[4] Though Martin did not define this acronym, "GC/MS" refers to "gas chromatography mass spectrometry." (*In re Brown* (1998) 17 Cal.4th 873, 877.) "Gas chromatography . . . separates components in a mixture and mass spectroscopy. . . identifies the components." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1352.)

asserts this resulted in a denial of his right to confront witnesses in violation of the due process clause of the Fourteenth Amendment.

We review a decision to admit evidence at a probation revocation hearing for abuse of discretion. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400.) Probation revocation hearings are fundamentally different from criminal trials. Because "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions," "thus the full panoply of rights due a [criminal] defendant . . . does not apply." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*).) In contrast to a criminal trial, at a probation revocation hearing there is no right to a jury, there is a lower burden of proof (preponderance of the evidence), and there are "[r]elaxed rules of evidence." (*Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60-61; see *People v. Maki* (1985) 39 Cal.3d 707, 715.)

"Probation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.) Accordingly, a due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant's rights. (*Morrissey, supra,* 408 U.S. at p. 482.) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Id*. at p. 481.) "As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding." (*People v. Brown* (1989) 215 Cal.App.3d 452, 454; *People v. Maki*, *supra*, 39 Cal.3d at p. 715.)

Section 777, governing juvenile probation revocation proceedings, provides the court "may admit and consider reliable hearsay evidence at the [probation revocation] hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in *People v. Brown*[, *supra,*] 215 Cal.App.3d [452] . . . and any other provision of law." (§ 777, subd. (c).) *Brown* held a probationer's confrontation rights were not infringed by allowing a police officer's testimony regarding the results of a drug test even though he had not been involved in the laboratory testing.

(*Brown*, at pp. 454-455.) The court held "[a]s long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' [Citation.] Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (*Id.* at pp. 454-455.)

In determining whether hearsay "bears a substantial degree of trustworthiness" such that it may be admissible at a probation revocation hearing, courts have distinguished between "testimonial" hearsay and non-testimonial hearsay. (*People v. Johnson*, *supra*, 121 Cal.App.4th at pp. 1410-1413.) If the hearsay evidence sought to be introduced is testimonial in nature, such as prior testimony, "good cause" must be established for its admission. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1158-1159.) The "need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor." (*Id*. at p. 1157)

In contrast, if the hearsay evidence is non-testimonial in nature, it may be admissible if it bears sufficient indicia of reliability. (*People v. Maki, supra,* 39 Cal.3d at pp. 715-717.) "Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*People v. Arreola, supra,* 7 Cal.4th at p. 1157.) Accordingly, in the context of probation revocation hearings, a "laboratory report does not 'bear testimony.' "[5] (*People v. Johnson, supra,* 121 Cal.App.4th at p. 1412.)

---

[5] At oral argument, X.T.'s counsel maintained Martin's testimony about the laboratory test results was more akin to the hearsay evidence found to be testimonial in *In re Kentron D.* (2002) 101 Cal.App.4th 1381. We disagree. The hearsay evidence on which the prosecutor relied in *In re Kentron D.* was statements in the section 777 petition

While X.T. acknowledges the foregoing case law, he asserts the "conclusions of these cases must be revisited" in the wake of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*).

*Crawford* rejected a "reliability" standard under the Sixth Amendment, holding the amendment precludes evidence of out-of-court testimonial statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant with respect to the statement. (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.) "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford, supra,* 541 U.S. at p. 61.)

*Melendez-Diaz* held *Crawford's* holding applied to a laboratory analyst's "certificates of analysis." The certificates setting forth the results of drug tests, explained the court, fell within the " 'core class of testimonial statements' " to which the Sixth Amendment right to confrontation applied. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.) The "analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ' "be confronted with" ' the analysts *at trial*." (*Ibid.*, first italics omitted, second italics added.)[6]

---

made by probation officers who were witnesses to Kentron D.'s actions that were in violation of his probation. (*Id.* at pp. 1384, 1387.) Though the statements at issue were in a document, they were "admitted in lieu of live testimony of percipient witnesses," and were the only evidence of the violation. (*Ibid.*)

[6] The California Supreme Court has granted review in *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620 and other cases to address whether the Sixth Amendment is implicated when a *supervising* criminalist testifies to the results of drug tests and reports prepared by another criminalist.

In *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*), the court considered whether *Melendez-Diaz* barred the admission of a probation report which included information gleaned from "electronic probation records" showing the probationer did not "report to the probation department as directed, make restitution payments, or submit verification of his employment and attendance at counseling sessions." (*Gomez*, at pp. 1038-1039.) The court held "[a]lthough the probation report would constitute testimonial hearsay under the expansive definition developed in recent confrontation clause cases, such as *Melendez-Diaz* . . . the confrontation clause is inapplicable to the probation revocation context. But within the parameters established by the body of precedent applicable to probation revocation, we conclude that the probation report was admissible and its admission did not violate defendant's due process right of confrontation." (*Gomez, supra*, 181 Cal.App.4th at p. 1039.)

X.T. argues we should not follow *Gomez* because its statement that the confrontation clause is "inapplicable" to probation revocation hearings is "misleading." He maintains "the overall structure of the Sixth Amendment protection" applicable to trials "clearly informs courts' understanding of the due process-based right to confrontation" applicable to probation revocation proceedings. We do not disagree that cases discussing the Sixth Amendment right to confrontation are "helpful . . . in determining the scope of the more limited right of confrontation held by probationers . . . ." (*Johnson, supra*, 121 Cal.App.4th at p. 1412.) "Helpful," however, does not mean controlling. *Gomez* followed long-established precedent in holding due process, not the Sixth Amendment, establishes the parameters of the limited confrontation right at probation revocation hearings. (See *Morrissey, supra*, 408 U.S. at p. 472.) And, federal courts considering the issue after the *Crawford* decision have similarly held there is "no basis in *Crawford* or elsewhere to extend the Sixth Amendment right of confrontation to supervised release proceedings." (*U.S. v. Hall* (9th Cir. 2005) 419 F.3d 980, 985-986; *U.S. v. Martin* (8th Cir. 2004) 382 F.3d 840, 844, fn. 4; see also *Peterson v. California* (9th Cir. 2010) 604 F.3d. 1166, 1170 [no Sixth Amendment right to confront witnesses at a preliminary hearing].)

While some of Martin's testimony was hearsay, it had ample indicia of reliability to satisfy due process concerns and thus be admissible at a probation revocation hearing. Martin had testified as an expert witness in toxicology over 50 times. He testified, and was subject to cross-examination, about the procedures used at Redwood Toxicology for receiving evidence for analysis, chain of custody, tests performed and results of the laboratory tests. Though Martin did not personally conduct the tests, he was the "certifying scientist" for the test results showing methamphetamine in X.T.'s urine. He "confirmed that all of those [test] steps were done in accordance with [the laboratory's] standard operating procedures." And he was the "final person" to certify the test results "prior to that result being accepted and reported." Accordingly, the trial court did not abuse its discretion in admitting Martin's testimony about the laboratory results.

## IV. DISPOSITION

The order finding X.T. in violation of his probation is affirmed.

_____
Banke, J.

We concur:

_____
Marchiano, P. J.

_____
Dondero, J.